

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
ACCESS)	
)	
Application for a New LPFM Station at)	File No. BNPL-20131114AUJ
San Diego, California)	Facility ID No. 196521

MEMORANDUM OPINION AND ORDER

Adopted: July 31, 2014

Released: July 31, 2014

By the Commission:

1. The Commission has before it an Application for Review (“AFR”) filed by ACCESS on February 10, 2014. In the AFR, ACCESS seeks review of the Media Bureau (“Bureau”) staff letter¹ that dismissed its application for a new LPFM station at San Diego, California, for failing to meet the minimum spacing requirements of Section 73.807 of the Commission’s Rules (“Rules”).² ACCESS acknowledges that the dismissal of its application was “completely valid under existing law and policy,” but argues that the international third-channel spacing requirements have proven to be unnecessary.³ Accordingly, ACCESS requests that the Commission refrain from dismissing its application in order to allow the Commission to encourage Mexico to change its spacing requirements.⁴

2. Section 5(c)(5) of the Communications Act of 1934, as amended, and Section 1.115(c) of the Rules bar applications for review that rely “on questions of fact or law upon which the [designated authority issuing the decision] has been afforded no opportunity to pass.”⁵ As ACCESS admits, it never

¹ Letter to ACCESS from James Bradshaw, Ref. 1800B3 (MB Jan. 10, 2014) (“Staff Letter”).

² 47 C.F.R. § 73.807. The Station proposes to operate on Channel 262. As noted in the *Staff Letter*, the Station’s proposed site is located 43.2 kilometers from third-adjacent XHTY-FM on Channel 259C1 in Tijuana, BN, Mexico. The minimum spacing requirement is 73 kilometers. *See Staff Letter*. *See also* 47 C.F.R. § 73.807(g)(2). The *Fifth Report and Order* in the LPFM proceeding generally eliminated the third-adjacent channel spacing requirement, but, as ACCESS acknowledges, explicitly maintained the international third-adjacent channel protection requirements, which are mandated by treaties between the United States and Canada, and the United States and Mexico. *See Creation of a Low Power Radio Service, Fifth Report and Order, Fourth Notice of Proposed Rulemaking and Fourth Order on Reconsideration*, 27 FCC Rcd 3315, 3321, n.44 (2012). In the AFR, ACCESS explains that its application failed to comply with the international spacing requirements because its engineering consultant’s software package, FM Commander Vsoft, eliminated both domestic and international third-adjacent spacing protection. AFR at 2.

³ *Id.* at 2.

⁴ *Id.* at 3.

⁵ *See* 47 U.S.C. § 155(c)(5); 47 C.F.R. § 1.115(c); *BDPCS, Inc. v. FCC*, 351 F.3d 1177, 1184 (D.C. Cir. 2003) (upholding Commission’s order dismissing arguments under Section 1.115(c) because that rule does not allow the Commission to grant an application for review if it relies upon arguments that were not presented below).

presented to the Bureau its argument that its application should be held pending a possible revision of Section 73.807.⁶ Accordingly, we will dismiss the AFR.⁷

3. ACCORDINGLY, IT IS ORDERED that, pursuant to Section 5(c)(5) of the Communications Act of 1934, as amended,⁸ and Section 1.115(c) of the Commission's Rules,⁹ the Application for Review filed by ACCESS IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marlene H. Dortch
Secretary

⁶ ACCESS argues that "no purpose would be served by seeking relief at the staff level, because staff are bound to follow and implement existing Commission policy, as they have done here." Petition at 2, n.1. However, ACCESS has not requested a waiver of Section 1.115(c) and we will not grant one *sua sponte*.

⁷ Additionally, as a separate and independent ground for our denial of the relief sought by ACCESS, were we to consider the AFR, we would deny it. See *Iglesia Pentecostal Cristo Misionera*, Memorandum Opinion and Order, 23 FCC Rcd 2230 (2008) (denying a request to keep a defective LPFM application pending until Congress addresses the domestic third-adjacent protection standard). ACCESS' proposal – to withhold action on defective applications pending a possible revision of the law – would require the Bureau to speculate whether, and, if so, how the treaty with Mexico may be changed at some unknown point in the future. Moreover, it would encourage parties to file applications that cannot be granted. The Commission has previously expressed concerns about the burdens on the staff and the processing delays caused by such applications, as well as the fundamental unfairness to parties that chose to defer filings because they could not comply with current Rules. See *Heartland Ministries, Inc.*, 25 FCC Rcd at 3575-76, n. 25, citing *Commission States Future Policy on Incomplete and Patently Defective AM and FM Construction Permit Applications*, Public Notice, 49 Fed. Reg. 47331 (Dec. 3, 1984) ("Incomplete and patently defective applications place an inordinate burden on our processing staff. This burden entails repeated requests by the staff for information clearly called for in the application. This delays the processing of not only the incomplete and patently defective applications, but also the processing of grantable applications. Most important, service to the public in the initiation of new broadcast service is delayed."). Finally, ACCESS's citation of section 1.115(b)(2) of the rules, which includes as the factors that may be cited in an application for review "[t]he action involves application of a precedent or policy which should be overturned or revised," is unavailing. AFR at 2. ACCESS's application was dismissed because of its proposal's failure to comply with a rule (47 C.F.R. §73.807(g)), not a Commission precedent or policy.

⁸ 47 U.S.C. § 155(c)(5).

⁹ 47 C.F.R. § 1.115(g).